

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs August 20, 2008

**DAVID LEE KESTNER v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Davidson County**  
**No. 2003-D-2670     Steve Dozier, Judge**

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**No. M2007-02329-CCA-R3-PC - Filed December 29, 2008**

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The petitioner, David Lee Kestner, appeals from the Davidson County Criminal Court's denial of post-conviction relief from his guilty-plea convictions of first degree felony murder, aggravated burglary, and especially aggravated robbery, for which he is serving concurrent sentences of life, three years, and fifteen years, respectively. The petitioner contends that he received the ineffective assistance of counsel and that he did not knowingly and voluntarily enter into the guilty pleas. We affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and CAMILLE R. McMULLEN, JJ., joined.

Ryan C. Caldwell, Nashville, Tennessee, for the appellant, David Lee Kestner.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Amy Hunter Eisenbeck and Rachel Marie Sobrero, Assistant District Attorneys General, for the appellee, State of Tennessee.

**OPINION**

According to this court's opinion on the appeal of certified questions of law, the facts of the petitioner's convictions are as follows:

[O]n April twenty-third, two-thousand-three, the Defendant's friend, the Co-defendant in this case, Jimmy Bonds, had gone over to the home of Thomas West and burglarized the home, when he wasn't there. During that burglary Mr. Bonds stole a large amount of marijuana.

On the twenty-sixth, Mr. Bonds got his friend, the Defendant, Mr. Kestner, to go back over to the residence to steal more drugs, money, and whatever else they could find in the apartment.

They went . . . before going over to Mr. West's apartment, which was located on the third floor of an apartment complex in Spinnaker Cove Apartments in Davidson County, they went to the apartment complex across the street, The Arbors, and stole a twenty-four-foot extension ladder off of a van in that complex; brought it over to Mr. West's complex, set it up against the back side of Mr. West's apartment, the balcony; and climbed up onto the balcony.

The Defendant entered the residence first, while carrying a twenty-five-caliber weapon, handgun; broke through the screen door-the glass door to the balcony was already open-entered the apartment, while Mr. West was sitting on his couch with his dogs watching TV.

Pretty much right when they walked into the apartment, the Defendant Kestner fired the weapon at Mr. West and hit him in his chest.

At that point Mr. West stood up, took a few steps toward the Defendant; and the Defendant then shot him in the head, which killed him immediately.

At that point the Defendant and Mr. Bonds went through the apartment, stole numerous items from the apartment, including the victim's gun, his jewelry, some drugs, money, personal items that were located in several bags throughout the apartment, including the victim's birth certificate, which was later found in a search warrant [sic] at the Defendant's friend Mr. Bond's parent's home.

State v. David Lee Kestner, No. M2004-02478-CCA-R3-CD, Davidson County, slip op. at 2-3 (Tenn. Crim. App. Feb. 10, 2006) (quoting State's factual recitation at plea hearing), perm. app. denied (Tenn. June 26, 2006).

The petitioner reserved three certified questions of law pursuant to his guilty pleas to the offenses of first degree felony murder, aggravated burglary, and especially aggravated robbery. This court declined to consider two of the three, both of which related to the trial court's denial of the defendant's motion to suppress his statement, because they were not dispositive of the case. With respect to the third certified question, this court held that the trial court did not err in denying the

defendant's motion to dismiss the indictment as violative of Rule 8(a) of the Tennessee Rules of Criminal Procedure. Id. See generally Tenn. R. Crim. P. 37(b)(2)(I) (2004) (renumbered Tenn. R. Crim. P. 37(b)(2)(A)) (certified questions of law); State v. Preston, 759 S.W.2d 647, 651 (Tenn. 1988) (holding that appellate court must decline to consider the certified question if court determines that issue is not dispositive of the case). The Tennessee Supreme Court denied permission to appeal.

The petitioner filed a pro se petition for post-conviction relief, alleging that he had not received the effective assistance of counsel because he thought when he pled guilty that his three issues would be reviewed by this court. The trial court appointed counsel. Counsel filed an amended petition which added the allegation that the petitioner had not entered his guilty pleas knowingly and voluntarily. The trial court conducted a hearing on the allegations.

At the post-conviction hearing, the petitioner testified that he pled guilty after trial counsel advised him that as part of the plea agreement, he would have the right to appeal three certified questions. He said counsel told him the issues "were to be dispositive of the case" but that he did not know the meaning of "dispositive" at the time. He also said that he did not remember counsel telling him that the court might not consider the issues. He said he would not have pled guilty if he had known the appellate court would not consider the issues.

The petitioner said he remembered acknowledging that he understood when the trial court advised him that the appellate court might not consider the issues. He said despite his having said he understood, he did not because he was in a state of shock that he was "signing [his] life away."

On cross-examination, the petitioner acknowledged that he had given a statement in which he admitted his guilt of the murder. He admitted that he was wearing the victim's necklace when he was arrested and that he possessed the murder weapon.

Trial counsel testified that he had never done a certified question of law in his seven years of practice before the petitioner's guilty pleas. He said he did not advise the petitioner that the questions must be dispositive of the case because he did not realize this until after the petitioner entered the pleas. Counsel said he realized he had given the petitioner bad advice and filed a motion to withdraw the guilty pleas. He said he brought his error to the trial court's attention at the hearing on the motion to withdraw the pleas.

Trial counsel testified that the petitioner had charges pending pursuant to two indictments. He said that the petitioner ultimately entered guilty pleas to both indictments and that the plea agreement ensured concurrent sentencing for the convictions from both indictments.

Trial counsel said that the State's evidence against the petitioner was compelling. He said that the case was a difficult one to defend based upon the state's evidence.

The transcript of the motion to withdraw the guilty plea was received as an exhibit at the post-conviction hearing. At that hearing, the petitioner testified that he had rejected a plea offer

because it did not give him an opportunity to appeal but that he had accepted a later offer which allowed him to reserve three certified questions of law. The petitioner said that trial counsel never used the word “dispositive” when advising him before he entered his pleas and that he had not heard this word until later. Trial counsel stated that two of the three issues reserved in the plea agreement were not dispositive of the case and that he had given his client bad advice. The trial court’s order on the motion to withdraw the guilty pleas has not been made part of the record, but the order denying post-conviction relief recites that the court denied the motion to withdraw and that the ruling was not appealed.

The trial court denied the post-conviction petition, finding that the petitioner had failed to prove by clear and convincing evidence that his pleas were not entered knowingly, understandingly, and voluntarily or that he had received ineffective assistance of counsel. The petitioner has appealed the denial of relief.

## I

The petitioner argues that he was denied the effective assistance of counsel because counsel failed to advise him that the certified questions of law would not be reviewed if they were not dispositive of the case and that he would not have entered his guilty pleas if he had known two of his three certified questions would not be reviewed. The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f). On appeal, we are bound by the trial court’s findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court’s conclusions as to whether counsel’s performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Under the Sixth Amendment, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel’s performance was deficient and (2) that the deficiency was prejudicial. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064; see Lockhart v. Fretwell, 506 U.S. 364, 368-72, 113 S. Ct. 838, 842-44 (1993). In other words, a showing that counsel’s performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, “the result of the proceeding would have been different.” Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. When a petitioner pleads guilty, he must show a reasonable probability that, but for the errors of his counsel, he would not have pled guilty. See Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985); Adkins v. State, 911 S.W.2d 334, 349 (Tenn. Crim. App. 1994).

In the present case, trial counsel acknowledged he had not advised the petitioner that the certified questions of law must be dispositive of the case in order to be considered by the appellate court and that there was no guarantee the appellate court would review the questions. Two of the three certified questions were not reviewed because they were deemed not dispositive. However, the petitioner acknowledged at the hearing that the trial court had given him this advice before he

accepted the plea agreement and that he had verbalized his understanding of it. We hold that the trial court did not err in finding that the petitioner failed to establish his ineffective assistance of counsel claim by clear and convincing proof. Even if the petitioner received incomplete advice from his trial counsel, he was given the correct advice before entering his pleas. Thus, he failed to establish that he was prejudiced by any deficient performance of counsel. Because he did not establish both prongs of his ineffective assistance of counsel claim, the trial court properly denied relief.

## II

The petitioner also argues that his guilty pleas were not knowingly and voluntarily entered because he was unaware of the requirement that certified questions must be dispositive of the case for appellate review to occur. When evaluating the knowing and voluntary nature of a guilty plea, the United States Supreme Court has held that “[t]he standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” North Carolina v. Alford, 400 U.S. 25, 31, 91 S. Ct. 160, 164 (1970). The court reviewing the voluntariness of a guilty plea must look to the totality of the circumstances. See State v. Turner, 919 S.W.2d 346, 353 (Tenn. Crim. App. 1995). The circumstances include

the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993) (citing Caudill v. Jago, 747 F.2d 1046, 1052 (6th Cir. 1984)). A plea resulting from ignorance, misunderstanding, coercion, inducement, or threats is not “voluntary.” Id.

We note that in the present case, the petitioner has failed to include the transcript of the guilty plea hearing and the transcript of the hearing on the motion to withdraw the guilty plea in the record. Notwithstanding these deficiencies, we have reviewed these documents from the record of the petitioner’s previous appeal. See T.R.A.P. 24 (content and preparation of the record); Delbridge v. State, 742 S.W.2d 266, 267 (Tenn. 1987) (courts may take notice of record in earlier proceedings of the same case).

The transcript of the plea hearing reflects that the court admonished the petitioner,

According to this Plea Petition, you and the State are in agreement that the three issues about the mandatory joinder and the suppression of your statement could be appealed, but there’s no – obviously, no

guarantee, number one, that they would accept the appeal; number two, that it would granted.

The petitioner voiced his understanding. After questioning about the petitioner's understanding of the waiver of jury trial, the court then asked the defendant if he understood the following:

And, other than this request for the certified question appeal, that I've mentioned previously, this would be your last day in court on this case.

The only issue potentially that you would be appealing to a higher court would be those issues about . . . the Court's prior ruling.

Do you understand that?

The petitioner responded, "Yes, sir, I do."

The transcript of the hearing on the motion to withdraw the guilty plea reflects that the petitioner was asked on cross-examination by the State whether at the guilty plea hearing, the court told him that there was no guarantee the appellate court "would take these issues" or that "they would be granted." The petitioner stated, "Yes, that is correct. But I felt we had a strong . . . case of appealing. That's only why I would ever have took [sic] a life sentence[.]" The prosecutor then restated the question, asking whether the petitioner accepted the plea "knowing full well that you may not be able to appeal or that the Court may not accept your appeal or that the Court may not grant that." The petitioner responded, "Yes, I understood."

Further, the petitioner acknowledged at the post-conviction hearing that the trial court advised him that his certified questions might not be reviewed by the appellate court and that there were no guarantees in this regard. The petitioner admitted that he told the trial court he understood this advice.

Given this evidence, we hold that the trial court did not err in finding that the petitioner failed to establish by clear and convincing evidence that his pleas were not knowingly and voluntarily entered. In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

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JOSEPH M. TIPTON, PRESIDING JUDGE